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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL FITZGERALD FRANKS, Defendant and Appellant.	G040386 (Super. Ct. No. 06NF1367) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed.

Terrence Verson Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Michael T. Murphy, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant contends the trial court erred in its evidentiary rulings and that the prosecutor committed misconduct. We affirm.

I

FACTS

A jury found defendant Michael Fitzgerald Franks guilty of assault with a deadly weapon and found it true he personally inflicted great bodily injury on the victim. The court imposed a 12-year prison term as his sentence.

Chris Anderson, a police officer for the City of Placentia was dispatched to Limes Sports Bar in Placentia on January 28, 2006 for an assault and battery investigation.

Anderson found the victim David Summerlin on the sidewalk in pain and "a strong odor of alcohol emitting from his person." When Anderson asked what resolution he wanted, Summerlin said he did not want to pursue any prosecution and "that he would take care of it himself and he requested medical attention." Paramedics were called.

During the trial, Summerlin identified defendant as the person who attacked him. He testified at trial he went to Limes Sports Bar in a friend's truck and they met some other friends there. He was asked how much he had to drink there and responded, "I'd say a lot. I don't count them." At closing time, he was opening the front passenger door when he heard something. He said, "I turned around and I saw a baseball bat swinging at my head. I blocked it with my left forearm. [¶] . . . [¶] It felt like thunder went through my body and my — I snapped my arm and then I blocked the bat with my right hand and broke my right knuckle and I fell to the ground and I kept getting hit in the back with the baseball bat until he missed a couple times and hit the car and I crawled away on my hands and knees."

Summerlin said the bat was aluminum and it shattered his arm with "extreme force, enough to take my bone and shatter it so it's sticking out of my forearm."

He described the person that hit him with the bat as, "shaved head, taller than me, skinny." Summerlin managed to get down on his hands and knees and crawl away and call 911 on his cell phone. Next, a car came "at a high rate of speed and they slammed on the brakes in front of me and I knew something was wrong" and "two people . . . said, 'Come on, DJ, [Summerlin's nickname] get in the car, we will take you to the hospital.' I am, like 'No, no.' I started backing away, one of them ran up and hit me in the face."

He said he was in "kind of a shock" and "everything kind of went blurry." Summerlin hid in the bushes until the police came. His arm was bloody and he "had a hole in the middle of [his] forearm where the bone came out." When the paramedics arrived, he told them he thought his arm was broken, and "he picked it up and he goes 'Yep.'"

Summerlin stayed in the hospital for three days. He said, "they told me they put a plate and six screws in my arm," and that he now has "a scar and bumps where the screws are." He wore a cast for months. He also has permanent pain in his right hand, left forearm and back. He can't lift heavy weight.

Dana Whittington identified defendant as the assailant in a photo lineup. She said she and Summerlin and Kevin were in the process of getting into her car when a white pickup truck "pulled up quick." Defendant got out of the truck. During her testimony, Whittington noted he had hair at the time of trial, but at the time of the incident, his head was shaved. He "grabbed the bat from the back of the truck" and hit Summerlin with the bat from behind. Summerlin tried to put his arms up to block the blows.

Whittington's car sustained damage during the attack. Defendant gave her his cell phone number to call regarding the damage. He also offered her his "I.D.," but she did not accept it. The next week, Whittington was in the same bar, and defendant approached her and handed her $260.

Later the police traced the cell phone number Whittington said defendant gave to her. The account was registered to Jennifer Franks.

Bartender Heather Smith said she learned of the incident when Whittington and a man knocked on the door to tell her about it. Smith wrote down the credit card number for the Visa card defendant used to pay his tab on the night of the incident; she gave the number to the police. She later identified defendant in a photo lineup.

Placentia Police Department Detective James McElhinney spoke with Whittington who told him she asked defendant why he attacked the victim, and defendant responded in a "very calm and casual" manner: "If you had heard what he had said to my girlfriend, you would understand."

IIDISCUSSION

Victim's Testimony

Defendant's argument centers around Summerlin's redirect testimony about his recent identification of defendant as the assailant when he could not identify him earlier. The prosecutor asked, "So what in your mind has influenced your ability to now identify the person who assaulted you?" Summerlin answered, "My counselor said that it takes time." The court overruled a hearsay objection, and Summerlin continued with his answer: "My counselor said that it is a traumatic experience and that your mind sometimes blocks things out and as soon as I saw the picture, it brought everything back." Summerlin was then asked, "Subsequent to this incident, did you talk to a counselor?" To that question, defense counsel unsuccessfully objected on the basis of relevance and lack of foundation. At the conclusion of that segment of Summerlin's testimony, the prosecutor asked if he had any doubt in his mind "that the defendant is the person who struck you with the baseball bat?" Summerlin answered, "No."

Defendant says, "The improperly admitted opinion testimony went to the heart of a major issue in the case (i.e., whether Summerlin's recollection of events was incurably tainted by his drug and alcohol use.)" He argues the trial court erred because

Summerlin's testimony amounts to an expert opinion without foundation. He further contends the evidence violated his constitutional rights to due process, confrontation and cross-examination under the United States Constitution.

"Defendant did not object on this ground below, and thus his constitutional claim has not been preserved for appeal. [Citations.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14.) "Defendant claims that by ruling as it did, the court committed error not only under the Evidence Code, but also under the United States Constitution — including the due process clauses of the Fifth and Fourteenth Amendments; the confrontation clause of the Sixth Amendment; and the cruel and unusual punishments clause of the Eighth Amendment. He failed to make any argument below based on any federal constitutional provision. Hence, he may not raise such an argument here." (*People v. Rowland* (1992) 4 Cal.4th 238, 265, fn. 4.) We agree with the Attorney General. Defendant did not preserve his claims.

Besides Summerlin's identification of defendant, there was abundant evidence that defendant was the attacker. Whittington also identified him. Defendant's statements to Whittington about paying for the damage to her car and about what Summerlin supposedly said to defendant's girlfriend are circumstantial evidence he committed the assault. Had there been error, it would be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.).

Had he not forfeited his argument, defendant's argument would not prevail on appeal. Defendant argues the admission of this evidence violates *Crawford v. Washington* (2004) 541 U.S. 36. The question presented in *Crawford* was whether the procedure of playing a tape recorded statement of a witness to a stabbing complied with the Sixth Amendments guarantee that, "'[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" (*Id.* at p. 42.) The court ruled the Sixth Amendment applied to testimonial statements. (*Id.* at pp. 68-69.)

"[I]n *Davis v. Washington* (2006) 547 U.S. 813, the United States Supreme Court held that the confrontation clause bars admission of an out-of-court 'testimonial' statement for the truth of the matter asserted when the defendant has no opportunity to cross-examine the declarant who made the statement." (*People v. Cage* (2007) 40 Cal.4th 965, 996 (dis. opn. of Kinnard, J.).)

"In *People v. Cage*, *supra,* 40 Cal.4th 965, our Supreme Court said: 'We derive several basic principles from *Davis*. First, . . . the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial.'" (*People v. Byron* (2009) 170 Cal.App.4th 657, 668.)

The United States Supreme Court recently decided *Melendez-Diaz v. Massachusetts* (2009) __ U.S. __ __ [129 S.Ct. 2527]. In that case, the court said affidavits reporting the results of forensic tests were testimonial. (*Id.* at p. __ [129 S.Ct. at p. 2532].) But the instant case involved no affidavits reporting test results.

Nor did Summerlin's testimony amount to the type of testimonial statement described in *Davis* and discussed in *Cage.* He merely answered the question ["So what in your mind has influenced your ability to now identify the person who assaulted you?"] by describing why he thought he did not remember his attacker at an early time. Under these circumstances, had defendant preserved his constitutional objections, he would not have prevailed.

Since an opinion of a mental health expert was not received in his trial, defendant also loses his concomitant argument that the court should have given the jury an expert witness instruction. "Trial courts only have a sua sponte duty to instruct on 'the general principles of law relevant to and governing the case.' [Citation.] 'That obligation includes instructions on all of the elements of a charged offense' [citation], and on recognized 'defenses . . . and on the relationship of these defenses to the elements of the charged offense.' [Citations.]" (*People v. Rubalcava* (2000) 23 Cal.4th 322, 333-

334.) "[T]here is no duty, in the absence of a request, to give an instruction limiting the purpose for which evidence may be considered. [Citations.]" (*People v. Simms* (1970) 10 Cal.App.3d 299, 311.)

Victim's Use of Drugs

Defendant's next argument concerns the trial court's ruling on a pretrial motion. Because Summerlin's emergency room records contained a statement that "he did admit to the hospital personnel that he had used meth on prior occasions and denied using drugs on the night of the incident," the prosecutor requested the court to order that defense counsel refrain from inquiring about "any prior meth use other than what might be relevant to the night of the incident." The court said: "If the defense had any kind of an offer of proof that it was within even 48 hours previous, the court would consider it."

Defense counsel asked permission to do a limited inquiry outside the presence of the jury, and the court responded: "We could do that, or actually I would allow you just without any kind of offer of proof or prove it up that he did. You can ask him in front of the jury whether he used any meth or any other controlled substances within the last 48 hours." Defense counsel made no further argument and merely thanked the court.

Defendant now claims: "The trial court erred by excluding evidence of the victim's long-term drug usage." But he provides no record citations that he attempted any of the tactics for which the court gave him permission. There is no citation to show he requested a hearing out of the presence of the jury, attempted to prove up the victim's long-term drug usage in the jury's presence, that he even asked the victim if he used drugs within the last 48 hours or that he attempted in any other way to have some evidence regarding the victim's drug usage admitted. Under these circumstances, we must conclude defendant waived this argument. **(***Schubert v. Reynolds* (2002) 95 Cal.App.4th 100, 109.)

Prosecutorial Misconduct

Defendant claims he was prejudiced by prosecutorial misconduct. His argument centers around three separate points: "First, there were references to a defense witness list and defense non-disclosure of a witness, neither of which were in evidence before the jury. Second, there were attacks on defense counsel's competence and good faith. Third, there was a speculative reference to a [Department of Motor Vehicle] DMV witness that could have been called by the prosecution."

One claim of prosecutorial misconduct relates to the following argument of the prosecutor about Whittington: "She was afraid and fearful. She didn't want to be involved but yet when the police found her and came to her, she gave them the statement. When we sent her a subpoena, she came in here. She marched up to the stand and she listened to question after question after question of defense counsel and he wants to make an issue of all of the 'I don't recall's from my witnesses.' Well, that's fine, but maybe if he could frame more intelligible questions, witnesses wouldn't have such a hard time answering them." Defense counsel: "Objection. Improper argument." The court: "Noted. Preserved. Overruled."

About that portion of the argument, defendant says: "The prosecutor's initial attack on defense counsel was when she argued that any problems with a prosecution witness[es]' testimony were the result of defense counsel's confusing and misleading questions. The trial court denied a defense objection to this argument."

The second claim of prosecutorial misconduct concerned Whittington's eyewitness identification. Apparently attempting to discredit her identification of defendant by implying it was someone else, and not defendant, who offered a driver's license to Whittington, defense counsel cross-examined her about whether she thought defendant tried to hand her his driver's license. Whittington said: "I figured it was an I.D. or a driver's license. I didn't know the difference or if there was a difference." She added: "The card that he was going to give me, I don't know if there was a difference, if

it was just an I.D. or his license." She admitted she did not know whether or not she told the police the item was a driver's license.

During the defense case, a police officer who had confiscated defendant's driver's license in August 2005 testified. During his cross-examination, the prosecutor elicited the officer's opinion that a California driver's license and a California identification card are "identical with the exception of the green identification card at the top of the card itself." He said, "Looks just like the California driver's license only says identification card in green instead of driver's license."

The prosecutor argued: "[W]e don't know that the defendant presented a license to Miss Whittington that day. She described it as a license when she interviewed with the officer. Here in court she said it was either a license or an I.D. or something. She didn't know. She said, 'I didn't look at it, I handed it back to him.' Who knows whether the defendant went and got another license, had a second license already, had a fake license. We know he had an I.D. card that the officer testified looks just like a California driver's license and had that officer been disclosed to the prosecution in advance and been on our witness list—" At that point, defense counsel said, "Objection. Misstates facts not to the evidence." The court overruled the objection, and the prosecutor continued, "—been on the defense witness list—" Defense counsel made the same objection and the court overruled it once more.

The third claim of prosecutorial misconduct concerns what the prosecutor said right after that second objection: "—maybe I could have called a DMV representative in time to talk about that. How I.D. cards are issued. Maybe have some samples. But in the big scheme of things, it's not a big factor in the case. Does it really matter whether the defendant handed over an I.D., a license. I mean, it's circumstantial evidence. Questionably."

"Generally, a claim of prosecutorial misconduct is preserved for appeal only if the defendant objects in the trial court and requests an admonition, or if an

admonition would not have cured the prejudice caused by the prosecutor's misconduct." (*People v. Ledesma* (2006) 39 Cal.4th 641, 726.) Regarding defendant's first and second claims of prosecutorial misconduct, the prosecutor's criticisms of the way defense counsel asked questions and counsel's not putting a police officer on the witness list, defense counsel did pose timely objections. But in his appellate brief, he does not cite to any portions of the record where an admonition was requested. Nor does he argue in his brief that an admonition would not have cured any prejudice.

Defendant did not object when the prosecutor said a DMV representative might have been called by the prosecution had defense counsel listed the police officer on the witness list. Since the court had just overruled two other objections to the same line of questions, it might be understandable that counsel did not want to pose a third objection. But defendant cites to no portion of the record to demonstrate counsel requested an admonition with regard to this question either

"'Improper remarks by a prosecutor can "'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.'" [Citations.]' [Citation.] 'But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citations.]" (*People v. Earp* (1999) 20 Cal.4th 826, 858.)

By discussing the witness list, the prosecutor referred to facts not in evidence, a situation which sometimes amounts to misconduct. (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1316.) In context, it appears the prosecutor was simply explaining to the jury why a DMV representative was not called as a witness, which, while outside the record, does not approach deceptive or reprehensible methods and is not misconduct.

The prosecutor did state that defense counsel had not disclosed a witness on the witness list. Defendant is correct that an attack on the integrity of defense counsel

can amount to misconduct. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215.) But the prosecutor's statement did not speak to defense counsel's integrity, and is not misconduct either. Likewise, there was no misconduct when the prosecutor gave an alternative explanation for a witness's possible evasive answers by pointing out the questions were not clear.

With regard to all three areas of alleged prosecutorial misconduct, it does not appear defendant requested the court to admonish the jury not to consider the prosecutor's statements. Defendant does not argue otherwise and we are satisfied that an admonition by the court would have cured any harm. (*People v. Smith* (2003) 30 Cal.4th 581, 633.) Under the state of the record before us, defendant forfeited his claim of prosecutorial misconduct. In any event, defendant's claims lack merit.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.